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Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF INDEPENDENCE, MISSOURI;
LARRY KAUFMAN, Acting City Manager,
City of Independence, Missouri;
WILLIAM CARPENTER, Mayor,
City of Independence, Missouri,

Petitioners,

v.

ROBERT E. RINEHART,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a plaintiff in an age discrimination case be required, as part of his prima facie showing, either to establish that he was replaced by someone outside the protected class or to adduce other evidence of age discrimination — the requirement in at least four circuits — or should he be able to avoid judgment as a matter of law merely by showing that he was replaced by someone younger, as held by the Eighth Circuit in this case?

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No.

IN THE

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OCTOBER TERM, 1994

CITY OF INDEPENDENCE, MISSOURI;
LARRY KAUFMAN, Acting City Manager,
City of Independence, Missouri;
WILLIAM CARPENTER, Mayor,
City of Independence, Missouri,

Petitioners,

v.

ROBERT E. RINEHART,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, City of Independence, Missouri; Larry Kaufman, Acting City Manager, City of Independence, Missouri; and William Carpenter, Mayor, City of Independence, Missouri, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in the above-entitled proceedings.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 35 F.3d 1263 and reproduced in

Appendix A at A-1. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix B at A-14. The unreported memorandum opinion and order of the United States District Court for the Western District of Missouri granting petitioner's Motion for Summary Judgment appears in Appendix C at A-15. The Supplemental Order of the district court is set forth in Appendix D at A-26.

JURISDICTIONAL STATEMENT

The Eighth Circuit's judgment in this Age Discrimination in Employment Act ("ADEA") case was entered on September 23, 1994. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated December 12, 1994. This Petition is being filed within 90 days of December 12. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 29 U.S.C. §623, *et seq.*, entitled "Prohibition of Age Discrimination":

> "It shall be unlawful for an employer —
>
> > "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."

STATEMENT OF THE CASE

Respondent Rinehart, an at-will employee of the City of Independence, was age 67 at the time of his termination by Petitioner Kaufman, the Acting City Manager who had complete hiring and firing authority (Apdx. A-2). Respondent had served as the Chief of Police of the City of Independence for twelve years. *Id.* Following respondent's termination, Major Shannon Craven, who was 48 years of age and one of Rinehart's three

immediate subordinates, was appointed Acting Chief of Police. *Id.* at A-3. Respondent brought suit in the United States District Court, Western District of Missouri, and jurisdiction was exercised pursuant to 28 U.S.C. §§1331, 1332, 1343(3) and (4), 42 U.S.C. §1983 and 29 U.S.C. §626(c).

After full discovery, petitioners moved for summary judgment on respondent's age discrimination claims on the basis that he had failed to show that age played a factor in his termination, a showing which petitioners contend is part of the prima facie case requirements for an ADEA termination claim when a plaintiff's replacement is within the protected age class. The district court, citing *Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117 (8th Cir. 1993), held that because respondent's replacement was over age 40, respondent was required to come forward with some other evidence by which a factfinder could find that the termination was age-related. As respondent had failed to make such a showing, the district court granted summary judgment for petitioners (Apdx. A-15).

The Court of Appeals reversed and ruled "that the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers aged 40 or above" (Apdx. A-6). The court further held that "the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case." *Id.* at A-8. Rehearing and rehearing en banc were denied, one judge dissenting. *Id.* at A-14.

REASONS FOR GRANTING THE WRIT

THERE IS A WIDE DIVERGENCE AMONG THE CIRCUITS ON THE IMPORTANT ISSUE PRESENTED BY THIS PETITION, AND THE RULE ADOPTED BY THE EIGHTH CIRCUIT CREATES AN ILLOGICAL PRESUMPTION IN FAVOR OF ADEA PLAINTIFFS.

The purpose of requiring a plaintiff to make a prima facie showing in order to avoid summary judgment is, of course, to weed out at the pre-trial stage those claims which are legally insubstantial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1976). All circuits are in basic agreement that a terminated ADEA plaintiff must show in his prima facie case that he was: (1) a member of the protected class, (2) qualified for the position, and (3) discharged or laid off. But the circuits are in complete disarray as to the fourth and final element of the plaintiff's required showing. Since the ADEA is designed to protect persons over age 40 from discrimination based on their age, many courts have required a terminated ADEA plaintiff either to demonstrate that he was replaced by someone outside the protected class or to come forward with other direct or circumstantial evidence that would support an inference of discrimination. The requirement of such a showing provides an adequate and reasonable basis for an inference of age discrimination, rather than merely permitting juries to assume (as they frequently are wont to do) that there is some causal connection between the plaintiff's age and the treatment accorded him.[1]

Without a requirement that a plaintiff either prove he was replaced by someone outside the protected class or adduce some

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[1] "A prima facie case . . . at least requires the plaintiff to show that the employer's actions were more likely than not based on a consideration of impermissible factors." *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1270 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987).

proof of age discrimination, there will be an "automatic presumption" of discrimination in nearly every ADEA case, since older employees who retire or are terminated frequently are replaced by someone younger. *See Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980). "'Because younger people often succeed to the jobs of older people for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.'" *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992), quoting *LaMontagne v. American Convenience Prod., Inc.*, 750 F.2d 1405, 1413 (7th Cir. 1984); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1443 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).

The Court of Appeals' ruling in this case permits such an inference and essentially enables a terminated plaintiff to get to the jury without adducing any proof whatever of discriminatory animus or conduct, leaving the jury free to punish the deep-pocket employer even though no evidence of discrimination has been presented.[2]

The Court of Appeals in this case acknowledged that "there is a split of authority on [the fourth element] in the other circuits . . . " and concluded that the position taken in its opinion ". . .

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[2] The confusion surrounding the prima facie case requirements has led to an increased number of appellate court reversals of verdicts that lacked adequate evidentiary support:

> "While it is true that jury verdicts are often correctly reversed by the appellate courts, a review of ADEA cases illustrates that the courts are overturning jury verdicts at an alarming rate . . . . This trend of juries returning verdicts for plaintiffs and defendants prevailing on appeal suggests that something is wrong in the courts' handling of ADEA cases."

Fayssoux, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA.L.REV. 601, 615 n.90 (1987).

appears to be consistent with the majority view" (Apdx. A-6 n.2). But the court's analysis was flawed, for if there is a "predominant" view, it is the approach adopted by the district court below and in the most recent pronouncements of the Fourth, Fifth, Eleventh and District of Columbia Circuits.

The following summary illustrates the divergence of the currently prevailing views held by the circuits:

- *First Circuit* — plaintiff must show only that the employer sought a replacement with roughly equal qualifications.[3]

- *Second Circuit* — plaintiff must show generally that he was replaced under circumstances giving rise to an inference of discrimination.[4]

- *Third Circuit* — plaintiff must show that he was replaced by one "sufficiently younger" to permit an inference of discrimination.[5]

- *Fourth Circuit* — plaintiff must either show that he was replaced by one from outside the protected class or adduce evidence that age was not treated neutrally.[6]

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[3] *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir. 1994).

[4] *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 508 (2d Cir. 1994).

[5] *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 53 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990); *but see Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) ("proof of replacement by a younger person is not conclusive of discrimination but is merely one element in a set of circumstances that may give rise to an inference of discrimination").

[6] *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

• *Fifth Circuit* — plaintiff must either show that he was replaced by one from outside the protected class or adduce some other evidence of age discrimination.[7]

• *Sixth Circuit* — there is an intra-circuit conflict as to the required showing.[8]

• *Seventh Circuit* — there is an intra-circuit conflict as to the required showing.[9]

• *Eighth Circuit* — according to the Court of Appeals in this case, plaintiff need only show that he was replaced by someone younger.[10]

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[7] *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir.), *cert. denied*, 114 S.Ct. 467 (1993); *Waggoner v. City of Garland*, 987 F.2d 1160, 1163-64 (5th Cir. 1993).

[8] *Compare Marr v. Dixon*, 1994 U.S. App. LEXIS 26597 p.12 (6th Cir. Sept. 19, 1994) (replacement must be from outside the class) *and Kauffman v. Kent State University*, 1994 U.S. App. LEXIS 6557 (6th Cir. Apr. 1, 1994) (failure to promote — replacement must be from outside the class) *with Manzer v. Diamond Shamrock Chemicals*, 29 F.3d 1078, 1081 (6th Cir. 1994) (the standard to be met is that replacement come from outside the class but the court further stated that "a prima facie case has been shown where the plaintiff was replaced by someone younger, even though that person may still be within the protected class") *and Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312 (6th Cir. 1989) (court held standard is replacement outside the protected class but then stated "[i]n the case at bar . . . [it was sufficient] that she was replaced by a younger person").

[9] *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153 n.2 (7th Cir.), *cert. denied*, 130 L.Ed.2d 313 (1994) (". . . there are no fewer than four different statements of the prima facie requirements in cases involving discharges").

[10] *Rinehart v. City of Independence, Mo.*, 35 F.3d 1263, 1265 (8th Cir. 1994); *but see Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993) ("plaintiff must also either show that the employer assigned a non-member of the protected class to do the same work . . . or make 'some additional showing' that age played a role in the discharge").

• *Ninth Circuit* — plaintiff must show that he was replaced by one "substantially younger."[11]

• *Tenth Circuit* — plaintiff must show that his replacement is younger.[12]

• *Eleventh Circuit* — plaintiff must show his replacement came from outside the protected class.[13]

• *District of Columbia Circuit* — plaintiff must show his replacement came from outside the protected class.[14]

This hodge-podge of contradictory rulings on such a heavily litigated issue of federal law cries out for clarification by this Court.[15] The test for submissibility endorsed below by the Eighth Circuit unfairly tips the scales in favor of the employee and permits jury consideration of discrimination claims that are based on nothing more than speculation and sympathy. It is also inconsistent with the goal of the ADEA "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). To achieve this goal in today's national and international workplace, there must be a uniform standard to guide employers in making termination decisions and to assist workers in deciding if their rights have

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[11] *Breitman v. May Co. California*, 37 F.3d 562, 565 (9th Cir. 1994).

[12] *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994); *but see Hall v. Western Prod. Co.*, 988 F.2d 1050 (10th Cir. 1993) (replacement must be from outside the class).

[13] *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994).

[14] *Hayman v. National Academy of Sciences*, 23 F.3d 535, 537 (D.C. Cir. 1994).

[15] According to the 1993 Annual Report of the Director of the Administrative Office of the United States Courts, there were 12,962 new "employment cases" filed during fiscal 1993. *See* Table C-2A. Even if only one-third of those involved ADEA discharge or layoff claims, the burden on the judicial system is apparent, and the necessity of weeding out meritless claims at the pre-trial stage is self-evident.

been violated. The current state of the law promotes confusion, endless litigation and, potentially, forum shopping.

The appropriateness of summary judgment on a given set of facts should not depend upon geographical happenstance or, for that matter, upon panel composition within a given circuit.[16] This Court should review this case and provide a uniform standard to govern the thousands of ADEA cases filed each year in the federal courts.

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[16] The irony of inconsistent outcomes reached by different panels of the same court is aptly demonstrated by comparing this case to *Banks v. City of Independence*, 21 F.3d 809 (8th Cir. 1994). Each plaintiff was, at the time of his termination, the oldest department director employed by the City of Independence. Both termination decisions were made by defendant Kaufman. Both plaintiffs were replaced by younger, subordinate employees. Banks and Rinehart filed identical complaints, and in both cases the district court granted summary judgment for the defendants. The judgment in *Banks* was affirmed because the panel required him, under the fourth element, to make an "additional showing" of age discrimination. The panel in *Rinehart* viewed almost identical facts but reached the opposition conclusion by applying a different test.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 1995

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-3560

Robert E. Rinehart,
Plaintiff-Appellant,

v.

City of Independence, Missouri; Larry Kaufman, Acting City Manager, City of Independence, Missouri; William Carpenter, as Mayor, City of Independence, Missouri,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: April 12, 1994
Filed: September 23, 1994

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

HANSEN, Circuit Judge.

Robert E. Rinehart appeals from the district court's order granting summary judgment on his age discrimination claims under the Age Discrimination in Employment Act and the Missouri Human Rights Act, and on his claim for retirement benefits under the Missouri Local Government Employees' Retirement System. Rinehart argues that in deciding his age discrimination claims, the district court erred by requiring him in this non-reduction-in-force case to show as part of his prima facie case either that he was replaced by someone outside the protected age class or that age was a determining factor in the termination decision. Rinehart also argues that the district court

erred in granting summary judgment to the defendants on his claim for retirement benefits. We reverse in part, affirm in part, and remand.

I.

Robert Rinehart served as Chief of Police of Independence, Missouri, for 12 years before he was fired on April 7, 1992, at age 67. On August 11, 1992, he filed this action in the United States District Court for the Western District of Missouri against the City of Independence, Missouri; William Carpenter, the Mayor of Independence, Missouri; and Larry Kaufman, the Acting City Manager of Independence, Missouri (collectively "the defendants"), asserting four claims. In count I, Rinehart asserted unlawful age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. In count II, he asserted the denial of due process and the violation of his First Amendment rights under 42 U.S.C. § 1983. In count III, he asserted unlawful age discrimination under the Missouri Human Rights Act (MHRA), Mo. Ann. Stat. §§ 213.010-213.137 (Vernon 1987). In count IV, he asserted that the City violated his right to benefits under the Local Government Employees Retirement System (LAGERS), Mo. Ann. Stat. §§ 70.600-70-70-750 (Vernon 1987).

The defendants filed a motion for summary judgment on all four of Rinehart's claims. Rinehart filed a resistance and submitted a variety of factual materials in support of his resistance. On September 28, 1993, the district court granted the defendants' motions for summary judgment on all claims.

In addressing the age discrimination claims in counts I and III, the district court applied the now familiar burden-shifting analysis the Supreme Court laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which requires a plaintiff to first establish a prima facie case of unlawful employment discrimination. The district court found that to establish a prima facie case,

Rinehart was required to show: "(1) he was within the protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; (4) his employer attempted to replace him." *Rinehart v. City of Independence, et al.*, No. 92-0728-CV-W-8, slip op. at 3 (W.D. Mo. Sept. 28, 1993) (quoting *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993)) (other citations omitted). The district court also found that the fourth element of the prima facie case test required Rinehart to show either that he was replaced by someone outside the protected class or that age played a role in the decision to discharge him. *Id.* (citing *Kehoe v. Anheuser-Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993)).

The defendants admitted, for the purposes of the summary judgment motion on counts I and III, that Rinehart could satisfy the first three elements of a prima facie case. The only issue was whether Rinehart had made a sufficient showing to satisfy the fourth element of the prima facie case. The district court concluded that Rinehart failed to make the necessary showing on the fourth element. The district court first found that Rinehart was not replaced by someone outside the protected class, which consists of workers age 40 and older, because he was replaced by Shannon Craven, who was 48 years old. The district court then found that Rinehart could only establish a prima facie case by providing evidence that age was a factor in the decision to fire him. The district court concluded Rinehart had failed to produce any such evidence and granted summary judgment for the defendants on counts I and III.

The district court also granted summary judgment on counts II and IV. In count II, Rinehart alleged both a violation of his due process rights because he did not receive a post-termination hearing and a violation of his First Amendment rights. The district court found that the record indicated only that Rinehart's own actions were responsible for the failure to receive the post-termination hearing and that there were simply no grounds for a

First Amendment claim. In count IV, Rinehart made a claim that his termination denied him the right to collect benefits to which he otherwise would have become entitled under LAGERS. After he was terminated, the City of Independence voted to reimburse current employees for certain LAGERS contributions they had made to the fund. Rinehart asserts a claim for the funds he would have received as reimbursement had he not been fired. The district court found that because he was not employed by the city at the time, he had no legal basis to support a claim for the reimbursement. Accordingly, the district court entered summary judgment against Rinehart on counts II and IV as well.

Rinehart appeals the district court's order to the extent it granted summary judgment on his age discrimination claims, counts I and III, and on his claim for LAGERS benefits, count IV. He does not appeal with respect to count II. The Equal Employment Opportunity Commission (EEOC) has filed an amicus brief on behalf of Rinehart which addresses the age discrimination claims.

II.

A district court should grant summary judgment only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's decision granting summary judgment de novo.

A.

Rinehart first argues that the district court erred in granting summary judgment on his age discrimination claims under the ADEA and the MHRA.[1] The only issue in dispute on these age

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[1] The parties agree that the same analysis applies for age discrimination claims under both the ADEA and the MHRA. *See Roberts v. Panhandle E. Pipeline Co.*, 763 F. Supp. 1043, 1050 (W. D. Mo. 1991); *Midstate Oil Co. v. Missouri Comm'n on Human Rts.*, 679 S.W.2d 842, 845-46 (Mo. 1984) (en banc).

discrimination claims is whether the district court correctly stated and applied the fourth element of a prima facie case of age discrimination. The district court required Rinehart to show as the fourth element of his prima facie case either (1) that he was replaced by someone outside the protected class of workers aged 40 or older or (2) that age was a factor in the termination decision. Rinehart argues that a prima facie case of age discrimination in a non-reduction-in-force case does not require a showing of either one of those factors but requires a showing only that he was replaced by someone younger. Given the facts of this case, we agree.

We have specifically noted that "[a] plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA; the plaintiff need only be replaced by a younger person." *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 366 n.6 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). Moreover, we have consistently held in Title VII cases that proof that the plaintiff was replaced by a person outside the protected class is not required. *Davenport v. Riverview Gardens Sch. Dist.*, No. 93-2032, slip op. at 6-7 (8th Cir. July 7, 1994); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Walker v. St. Anthony's Med. Ctr.*, 881 F.2d 554, 558 (8th Cir. 1989). In both *Davenport* and *Williams*, we specifically found that the district court erroneously required the plaintiff to show he was replaced by someone outside the protected class in order to establish the fourth element of his prima facie case. *Davenport*, slip op. at 6; *Williams*, 14 F.3d at 1308. While this evidence is probative of the ultimate issue of intent to discriminate, it is not a per se requirement, and thus it is not required to show a prima facie case. *Davenport*, slip op. at 6; *Williams*, 14 F.3d at 1308. Because the prima facie case standards in Title VII cases and those in ADEA cases are substantially similar, *see, e.g., Radabaugh*, 997 F.2d at 448; *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (applying the same prima facie case for analyzing Title VII, ADEA, and other

employment discrimination claims); *see also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting Title VII and ADEA similar in both their aims and substantive provisions), we conclude that the rationale of the Title VII cases should extend to the present case as well. We conclude that the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers aged 40 or above.[2]

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[2] While there is a split of authority on this issue in the other circuits, our position appears to be consistent with the majority view. *Compare Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994) (prima facie case of age discrimination does not require showing that replacement came from outside protected class — "[i]ndeed, it is considered 'hornbook law' that the ADEA action can be based on discrimination between older and younger members of the protected class"); *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1374 (2d Cir. 1989) (noting in dicta that plaintiff in ADEA suit not precluded from prevailing when replacement is younger but within protected class), *cert. denied*, 494 U.S. 1026 (1990); *Freeman v. Package Mach. Corp.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988) (replacement by younger person or one outside protected class "not an element of the plaintiff's prima facie case in an ADEA suit"); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985) (to make a prima facie case "replacement need not be younger than 40, the age at which ADEA protection begins"), *cert denied*, 474 U.S. 1057 (1986); *Douglas v. Anderson*, 656 F.2d 528, 532-33 (9th Cir. 1981) (replacement need not be within protected class to establish a prima facie case on ADEA claim); *with Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (fourth element of prima facie case is that replacement comes from outside protected class; *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (same); *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993) (third element of prima facie case is that replacement from outside protected class); *see also Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 & n.2 (5th Cir. 1992) (fourth element of prima facie case is *either* replacement is from outside protected class or replacement is younger or discharge was based on age). We note, however, that there is also contrary authority in the Fourth and Sixth Circuits, *see Lovelace v. Sherwin-Williams, Co.*, 681 F.2d 230, 237-38 n.5 (4th Cir. 1982) (ADEA claim does not require proof that replacement came from outside class); *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.)

(Footnote 2 continued on next page)

Similarly, we have never required plaintiffs bringing age discrimination claims to make as part of the fourth element of a prima facie case an "additional showing" that age was a factor in the termination decision other than in reduction-in-force cases. *See, e.g., Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985). In *Bashara*, we specifically stated:

> In circumstances not involving a reduction in force, a plaintiff may make a prima facie case of age discrimination by establishing (1) that he is within the protected age group; (2) that he met applicable job qualifications; (3) that he was discharged; and (4) that, after his discharge, the position remained open and the employer sought applicants with similar qualifications to fill the position. *See, e.g., Holley*, 771 F.2d at 1165. In the context of a reduction in force, however, the fourth requirement creates difficulties. The plaintiff's position does not remain open; rather it is eliminated or combined with another position. *Id.* Accordingly, in *Holley*, we held that to establish a prima facie case in a reduction-of-force situation, the plaintiff must meet the first three requirements and "'must come forward with additional . . . evidence that age was a factor in his termination.'" *Id.* at 1166 (quoting *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1091 (6th Cir. 1984)).

26 F.3d at 823. As *Bashara* demonstrates, we have limited this "additional showing" that age was a factor in the plaintiff's

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(Footnote 2 continued)

(employer violates ADEA even if younger employee receiving favorable treatment is in protected class), *cert. denied*, 498 U.S. 878 (1990), and the Eleventh Circuit has specifically qualified this issue, *see Carter v. City of Miami*, 870 F.2d 578, 582 n.11, 583 (11th Cir. 1989) (noting that the third prong of prima facie case is flexible and inability to show replacement was outside the protected class not absolute bar to establishing prima facie case).

termination to cases involving a reduction in force. Because there is agreement that this is not a reduction-in-force case, we conclude that the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case.

The defendants argue that the district court simply relied on *Kehoe* in stating the fourth element of the prima facie case and should be affirmed. In *Kehoe*, we stated the fourth element of the prima facie case as follows: "plaintiff must also either show that the employer assigned a non-member of the protected class to do the same work (a fact necessarily absent from this reduction-in-force case) *or* make 'some additional showing' that age played a role in the discharge." 995 F.2d at 119 (quoting *Holley*, 771 F.2d at 1165-66). The defendants acknowledge that *Kehoe* was a reduction-in-force case and that we stated the test in that context. They argue nonetheless that the statement of the test in *Kehoe* applies with full force in this non-reduction-in-force case. In particular, they argue that *Kehoe* establishes that the fourth element of the prima facie case includes a requirement that a non-member of the protected class replaced the fired worker from a protected class. The defendants rely on parenthetical language in *Kehoe*, where we stated that the replacement must come from outside the protected class and then parenthetically noted, "a fact necessarily absent from this reduction-in-force case." 995 F.2d at 119. The defendants assert that if replacement from outside the class is a requirement necessarily absent in a reduction-in-force case, then it must be meant to apply to non-reduction-in-force cases.

To the extent *Kehoe*, a reduction-in-force case, stated the test for non-reduction-in-force cases, we conclude that the statement is dicta which does not control in this case. Moreover, we do not believe the panel in *Kehoe* intended (without citation or discussion) to create a standard that is contrary to our observations in *Hillebrand*, 827 F.2d at 366 n.6. ("plaintiff need not be replaced

by a person outside the protected age group to make out a prima facie case under the ADEA"), and to our Title VII case law, *see Williams,* 14 F.3d at 1308, we well as to the position of the majority of the other circuits. Accordingly, we will not interpret *Kehoe* to create such a standard.

The defendants argue that even if *Kehoe* does not control, we still should affirm the district court's articulation of the fourth element of a prima facie case given the particular facts in this case. The defendants point out that the elements of a prima facie case are flexible and vary depending on the factual situation giving rise to the dispute. *See, e.g., Johnson v. Minnesota Historical Soc.,* 931 F.2d 1239, 1242 (8th Cir. 1991) (citing *Halsell v. Kimberly-Clark Corp.,* 683 F.2d 285, 289 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983)), and that the prima facie case should require plaintiffs to demonstrate that the adverse employment action occurred "'under circumstances which gave rise to an inference of unlawful discrimination.'" *Halsell,* 683 F.2d at 289 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 n.6 (1981)); *Johnson,* 931 F.2d at 1242 (quoting *Halsell*). The defendants argue that if we reverse the district court and accept Rinehart's argument that the fourth element requires him to show only that a younger worker replaced him, Rinehart will be allowed to establish a prima facie case of age discrimination even though the fact that he was replaced by someone younger should not give rise to an "inference of unlawful discrimination" on the facts of this case. According to the defendants, those relevant facts requiring a greater showing include the fact that Rinehart was the oldest employee of the department, that all three of his logical replacements were younger, and that he was replaced by one of those younger people, Shannon Craven, whom Rinehart admits he would have chosen as his successor.

We are not persuaded that these facts require Rinehart to make a showing beyond our normal prima facie case requirements.

The normal statement of the prima facie case is generally sufficient to raise:

> an inference of discrimination only because we presume [the employers' decisions], *if otherwise unexplained,* are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the discharge] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration. . . .

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added) (citation omitted). The only identifiable set of cases where we specifically have required a showing by plaintiff beyond the normal prima facie case are reduction-in-force cases. In those cases, we require plaintiffs to make a showing in addition to the normal prima facie case because the employer's reason for discharging the plaintiff is not "otherwise unexplained." The reduction-in-force is an objective, legitimate explanation of the employer's action which the plaintiff does not call into question by establishing a prima facie case under the regular standards. *See Leichihman v. Pickwick Int'l,* 814 F.2d 1263, 1270 (8th Cir.) (no adverse inference can be drawn in reduction-in-force case if we apply normal prima facie standards because the employer's action is readily explained by employer's economic hardship or downturn in business), *cert. denied,* 484 U.S. 855 (1987); *see also Barnes,* 896 F.2d at 1465 (in reduction-in-force case proving the normal elements of the prima facie case is not enough because no evidence presented under such test that the workforce reductions were not the reason for the adverse employment actions). Accordingly, we require an additional

showing only where the objective factual record already contains a legitimate explanation for the employer's actions that is not accounted for when the plaintiff establishes a prima facie case under normal standards.

Here, we will not require Rinehart to make the additional showing the district court applied in this case, or any other additional showing, because the facts the defendants contend give rise to an additional showing do not provide any objective explanation for the employer's decision to discharge Rinehart. The facts on which the defendants rely do not even address the question of why the City decided to discharge him. Instead, those facts deal only with why the replacement was a logical choice to succeed plaintiff. Hence, the objective factual record does not provide an additional objective explanation for Rinehart's discharge that is not accounted for in the normal prima facie test.

The defendants also argue that policy considerations warrant affirming the district court's statement of the fourth element of the prima facie case. The defendants argue, for example, that requiring only that the replacement be younger would allow a 68-year-old plaintiff to establish a prima facie case of age discrimination even if that plaintiff was replaced by a 67-year-old worker, although no inference of age-based discrimination would be warranted. The defendants contend that the district court's articulation of the fourth element of the prima facie case is more appropriate because it would require a showing which, if satisfied, would raise an inference of age-based discrimination in all such cases.

We need not address the defendants' illustration because those facts are not before us. Rinehart was replaced by someone 19 years younger than he was, not someone a year younger. However, we believe that district courts faced with facts similar to those outlined in the defendants' hypothetical nonetheless would not need to require plaintiff to show that he or she was replaced by someone outside the protected class or to show that

age was taken into consideration in the employment decision. Instead, district courts simply could require the plaintiff to show as the fourth element of a prima facie case that he or she "was replaced by a person *sufficiently younger* to permit an inference of age discrimination." *Armbruster v. Unisys Corp.*, 1994 U.S. App. Lexis 19883 at *24-*25 (3d Cir. 1994) (citing *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)); *see also Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988) (plaintiff must show "he was replaced by a worker sufficiently younger in the context of his employment"). Requiring a showing that the replacement is "sufficiently younger" would require the plaintiff to raise an inference of discrimination and would be consistent with our previously stated requirement of the fourth element of the prima facie test.

We conclude that the district court erred in requiring Rinehart to demonstrate that he was replaced by someone outside the protected class or that age was a factor in the termination decision in order to make out a prima facie case of age discrimination. Because we reach that conclusion, we need not address his argument that he sufficiently demonstrated that age was a factor in the termination decision. Accordingly, we reverse the district court's order granting summary judgment on Rinehart's age discrimination claims and remand them to the district court for further proceedings.

B.

Rinehart also argues that the district court erred in granting summary judgment on his claim in count IV for reimbursement of LAGERS payments he would have received had the City not terminated his employment. Rinehart has cited no authority to support his LAGERS claim in either this court or the district court. We have found no authority to support the claim. Accordingly, we conclude that the district court committed no error in dismissing this claim without prejudice to its use as an element of damages if liability is established on counts I or III.

III.

We reverse the district court's grant of summary judgment on Rinehart's age discrimination claims and remand for proceedings consistent with this opinion. We affirm the district court's grant of summary judgment on Rinehart's claim for reimbursement of retirement benefits.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT

No. 93-3560WMKC

Robert E. Rinehart,
Appellant,

vs.

City of Independence, Missouri, et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Loken would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

December 12, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0728-CV-W-8

ROBERT RINEHART,
Plaintiff,

v.

CITY OF INDEPENDENCE, MISSOURI, et al.,
Defendants.

ORDER

[Filed: Sept. 28, 1993]

This matter is before the Court on defendants' motion for summary judgment.

Plaintiff was the police chief of Independence, Missouri from October 24, 1980, until he was terminated on April 7, 1992. When he was fired, plaintiff was 67 years old. Plaintiff has brought this suit against the City of Independence, Larry Kaufman, the Acting City Manager who fired him, and Independence Mayor William Carpenter, alleging that a motivating factor behind his termination was his age. His lawsuit contains four counts. Count one alleges age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*. Count II alleges violations of plaintiff's due process and first amendment rights in that he was not given reasons for his discharge or an opportunity to contest the discharge and that he was fired for political reasons. Count III alleges age discrimination in violation of the Missouri Human Rights Act, § 213.110 *et seq.* Finally, count four alleges a claim for state retirement benefits.

This Court recently dismissed plaintiff's claims for punitive damages under Counts II and III. *See* Order of August 31, 1993.

Defendants now move for summary judgment on all counts.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts must be viewed in the light most favorable to the nonmoving party, who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. *Adickes v. S.H. Kress & Co.*, 398 U.S 144 (1970); *Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

If a party is unable to make a sufficient showing as to some essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party seeking summary judgment bears the initial burden of demonstrating to the court that an essential element of the nonmoving party's case is lacking, *Id.* The burden then shifts to the nonmoving party to come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element, or to explain why such evidence is not currently available. *Id.*; Fed. R. Civ. P. 56(e). If the nonmoving party fails to so respond, summary judgment, if appropriate, shall be entered against such party. Fed. R. Civ. P. 56(e). The standard for determining whether a factual dispute is genuine is the same as the standard applied to motions for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The nonmoving party must come forward with sufficient evidence to allow a reasonable jury to find in its favor. *Id.* at 251.

Defendant argues that summary judgment is appropriate on the age discrimination claims because plaintiff cannot make a prima facie case of discrimination. To establish a prima facie case of age discrimination based on pretext, the plaintiff must show: "(1) he was within the protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; and (4) his employer attempted to replace him." *Radabaugh v. Zip Feed Mills. Inc.*, 997 F.2d 444, 448 (8th Cir. 1993), *citing Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (1988). The Eighth Circuit has also stated that the fourth element of a prima facie case must include a showing that the plaintiff was replaced by someone outside of the protected class, or some other showing that age played a factor in the discharge. *Kehoe v. Anheuser-Busch. Inc.*, 995 F.2d 117, 119 (8th Cir. 1993).

After the plaintiff has established a prima facie case, the defendant must articulate a legitimate reason for the action, "which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1824 (1973). The burden is then on plaintiff to persuade the jury that defendant's reason for the termination is merely pretextual and that the real reason for the termination was age discrimination. *Id.*[1]

Defendants admit, for the purposes of this motion, that plaintiff can show the first three elements of the prima facie case.

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[1] Under the law announced in *Hicks*, once the defendant has provided a legitimate, non-discriminatory reason, the presumption created by the prima facie case is dissolved, and the plaintiff bears the burden of persuading the trier of fact that defendant's proffered reasons are false and that discrimination was the real reason for the termination.

However, they argue that plaintiff cannot satisfy the fourth element, as it is interpreted by the Eighth Circuit.

Contrary to the convoluted and irrelevant posturing in plaintiff's brief, the only issue on this summary judgment motion as to Counts I and III is whether there is a genuine issue of material fact regarding the fourth element of the prima facie case.

Defendants contend that Larry Kaufman alone terminated plaintiff and that he made the decision for reasons other than plaintiff's age. The City Manager position in Independence gives complete authority for hiring and firing to the city manager. Such actions need no input or authority from the Mayor or the City Council. Defendants claim that plaintiff was never told that he was terminated because of his age and that plaintiff knows of no statements by Kaufman about the age of plaintiff or any city employees in general. Defendants claim that no members of the City Council, including Mayor Carpenter, ever discussed plaintiff's termination with Kaufman before April 7, 1992 or otherwise played a role in his termination.

In addition, defendants state that plaintiff's replacement, Major Shannon D. Craven, was 48 years old when he was made acting Chief of Police, and, therefore, was within the protected age group of [sic] under the ADEA.

All of defendants' assertions are backed up with citation of deposition testimony, affidavits, or other documentary evidence. Through these assertions, defendants have demonstrated that an essential element of plaintiff's prima facie case is missing. As discussed above, in order to establish the fourth element of the prima facie case, plaintiff must show either (1) plaintiff was replaced by a person outside of the protected class; or (2) some evidence by which a factfinder could find that the termination was age-related.

Defendant has shown that plaintiff was replaced by 48-year-old. The protected class consists of workers aged forty and older. 29 U.S.C. §§ 621-634. Therefore, plaintiff cannot satisfy the fourth element by this type of showing. Instead, plaintiff must make a prima facie case by coming forward with some other evidence of [sic] that age was a factor.

In his complaint, plaintiff presents four reasons why he suspects that his firing was based on his age: (1) various retirement inquiries by city officials; (2) a comment by the mayor to plaintiff that "If I were you I would leave with some dignity"; (3) a comment about plaintiff's age by the mayor the day before he was fired; and (4) an alleged "hit list" of certain city employees, many of whom are over the age of forty.

Defendant dismisses all comments made by persons other than Kaufman on the grounds that Kaufman alone made the decision to terminate plaintiff. Defendant argues that any inquiry by Kaufman as to when plaintiff was going to retire was unrelated to plaintiff's termination and was based on a previous promise by plaintiff to retire at age 65. These assertions are also supported by deposition testimony, affidavits, or other documentary evidence.

The crucial issue, then, becomes whether plaintiff can show that Kaufman acted with others in deciding to fire plaintiff, and if not, whether there is some evidence that *Kaufman* used age as a reason to fire plaintiff.

Plaintiff disputes defendants' assertion that Kaufman acted alone in terminating him. Under *Celotex*, plaintiff must come forward with sufficient evidence to show that there is a factual dispute as to a material issue. In viewing plaintiff's evidence, the Court must view plaintiff's evidence in the light most favorable to him and grant plaintiff the benefit of all reasonable inferences that can be drawn from the evidence.

First plaintiff asserts that he is not bound by the "self-serving" statements of Kaufman about his acts. Plaintiff is only bound by Kaufman's "self-serving" assertions to the extent that plaintiff is unable to show that there is a genuine issue of material fact as to what Kaufman has claimed. Next, plaintiff sets forth 23 paragraphs of "facts" that put into dispute defendants' claims that Kaufman acted alone or that Kaufman did not discriminate.

Plaintiff's paragraphs a, c, d, e, f, h, i, j, k, and o deal with the desires of Cary George to be assistant chief or later, chief of police. In paragraphs a, e and f, plaintiff asserts that city councilman Ruhlman wanted his friend George to replace Rinehart as chief and asked Rinehart when he would retire. Plaintiff alleges that differing recollections of these events by the parties create a genuine issue of material fact. While the differences may create an issue of fact, the Court cannot see how these posturings by an aspiring officer raise an inference of age discrimination, especially when that aspirant was also within the protected class. Therefore, these facts are not material.

Plaintiff also alleges that the fact that Major Craven, Rinehart's eventual successor, was 48 years old shows an inference of discrimination or shows that Kaufman was not acting alone. This fact does not demonstrate that Kaufman had help in the decision, and as discussed above, Craven's status within the protected class does nothing to make an additional showing of discrimination.

Paragraph m recounts that councilman Callahan told Rinehart after the firing that he did not think Kaufman had the authority to fire plaintiff and expressed a hope that age was not a factor. Callahan's unsupported, hindsighted opinions are not evidence of anything. Plaintiff cannot show that Callahan knew of the true reasons for plaintiff's termination nor that Callahan had any input into the decision. Similarly, paragraph n states that the current City Council is uneasy about the acting city manager

appointing a new police chief. While this may express the council's opinion about Kaufman's powers, it decides nothing about his legal authority or motives for terminating plaintiff.

Paragraph p speaks of Rinehart's health and qualifications, which relates to the second element of the prima facie case, but does not apply to the fourth element.

Paragraphs q and r allege that plaintiff was not told nor did he know of any reason he should have been fired. These may go to the issue of pretext, but do not add to the inquiry on element four.

Paragraphs s, u, v, and w involve comments by persons other than Kaufman, and, therefore, did not relate to Kaufman's decision to terminate Rinehart.

None of the facts recited by plaintiff in any way controvert Kaufman's statement that he acted alone. Therefore, plaintiff is left to only show that Kaufman himself had discriminatory intent.

The only allegations plaintiff is able to put forward that would raise an inference that Kaufman's employment decision was based on age are in paragraphs g and t.

Paragraph g alleges that plaintiff stated in his deposition at page 35 that Kaufman indicated that he wanted to replace plaintiff with a younger person. Plaintiff attached various pages of his deposition testimony in support of his response to the motion for summary judgment. The pages range from 57 to 254, but do not include page 35, where Rinehart makes the allegation. The Court has read the deposition testimony supplied and nothing Rinehart said in those portions makes reference to or supports any allegation that Kaufman told plaintiff he was going to replace him with someone younger. Of particular relevance is the following exchange:

Q. Have you ever heard Mr. Kaufman make any remarks or statements relating to your age?

A. I don't recall.

Q. You don't recall any statements as we are sitting here today that Mr. Kaufman has made?

A. I can't testify to any today because I don't recall.

Q. Have you ever heard Mr. Kaufman make any statements that you recall relating to older people in general?

A. I don't recall.

Q. Have you heard him make any statements relating to older city employees?

[Objection by plaintiff's counsel on the basis of vagueness]

Q. I'm just talking about any comment you recall of any nature in which Mr. Kaufman was discussing the subject of older employees?

A. I can't recall at this time.

Q. Do you recall Mr. Kaufman at any point discussing the age of city employees in general?

A. I don't remember at this time.

Q. Have you ever hear [sic] Mr. Kaufman make any statements or remarks that you think is indicative of a discriminatory attitude on his part toward older individuals?

A. Only when he asked me when I was going to retire, or how much longer I was going to work, or both.

Q. Mr. Kaufman never explained to you why he was asking that?

A. I don't recall asking, and I don't recall whether he explained or not.

Rinehart deposition, at 68-70, attached to plaintiff's response to summary judgment motion as Exhibit A.

This exchange makes clear that Rinehart does not recall any statement by Kaufman that would indicate that he intended to replace him with a younger person. In truth, plaintiff was actually replaced by a younger person. However, as discussed above, the replacement of plaintiff with a younger person does not establish a prima facie case of discrimination where the replacement is younger, but is still within the protected age group. Any statement by Kaufman that he intended to replace plaintiff with Maj. Shannon or Maj. Cary does not raise an inference of discrimination simply because those officers are younger.

The deposition exchange highlights the failure of plaintiff to make any other showing of discriminatory intent by Kaufman. Inquiries about when a person nearing or past retirement age might take retirement are, standing alone, proof of nothing. Besides this comment, plaintiff's case rests entirely on alleged statements of persons extraneous to the decision-making process on his termination.

Paragraph t states that Parley Banks, another Independence employee who was terminated and sued the city for age discrimination, filed an affidavit alleging that Kaufman admitted that he participated in Council discussions about terminating retirement-age employees based on their age. The affidavit claims that Kaufman's admission came in documents filed in Banks' case, which has been dismissed on summary judgment. Plaintiff has not supplied the alleged admissions or anything more solid than Banks' characterizations of them.

While the Court can give no weight to Banks' unsupported allegations, the Court does give considerable weight to the decision of another division of this Court in dismissing his case. *Banks v. City of Independence*, No. 92-0314-CV-W-3 (Hunter, S.J.) On summary judgment in that case, defendants contended that Kaufman made the decision to fire Banks alone. Plaintiff Banks alleged many of the same statements and types of actions as Rinehart alleges in this motion. The *Banks* Court addressed whether plaintiff's barrage of extraneous facts did anything to help plaintiff's effort to establish the fourth element of the prima facie case and found that the facts were irrelevant to the prima facie case of discrimination.

The same issue and nearly the same facts are before this Court, and this Court agrees that plaintiff's large quantity of "facts" do not reveal a genuine issue of material fact. While plaintiff's "facts" may be interesting to a lay reader, they fail to controvert defendant's contention that Kaufman acted alone, and that he acted without using age as a determinative factor. If plaintiff cannot make this showing, he cannot make any causal link between comments that may have been made by others and his termination. Without such a showing, plaintiff fails to state a prima facie case of age discrimination, and defendants must prevail on summary judgment.

Defendants also move for summary judgment as to Count II, which alleges due process, first amendment and Count IV which alleges pension funds claims.

Defendants, in their motion, demonstrated that any failure of plaintiff to receive a post-termination hearing was his own doing, and that there are no grounds for a first amendment claim. Plaintiff has made no effort to controvert the factual allegations of defendants or to argue against defendants' citations of law. The Court finds no basis to support Count II and it shall be dismissed.

As to Count IV, plaintiff alleges that the city failed to return his contributions to the LAGERS retirement fund. In April 1988, the City Council voted to stop requiring city workers to contribute to the LAGERS Retirement System. In September 1992, the City Council acknowledged receipt of a statement of costs to reimburse city employees for contributions they made to the system. In December 1992, the City Council resolved to return contributions at a later date. Finally, in February 1993, the City Council voted to reimburse *current* city employees for contributions made to the fund. Independence City Ordinance No. 12321.

Since plaintiff was not employed by the City in February 1993, he was not eligible to be reimbursed for his contributions to the fund.[2] There is no legal basis upon which plaintiff can support a claim for LAGERS contributions. The Court does understand that plaintiff is receiving his monthly retirement benefits from the LAGERS system.

Plaintiff has advanced no legal argument or factual issue that would preclude summary judgment on this ground.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Dated: Sept. 29, 1993

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[2] An employee may request return of contribution if he or she leaves LAGERS-covered employment before becoming eligible for retirement. Mo. Rev. Stat. § 70.690(1).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0728-CV-W-8

ROBERT RINEHART,
Plaintiff,

v.

CITY OF INDEPENDENCE, MISSOURI, et al.,
Defendants.

SUPPLEMENTAL ORDER

[Filed: Sept. 29, 1993]

In the September 28, 1993 Order granting summary judgment to defendants, the Court indicated that plaintiff failed to enclose a portion of deposition testimony upon which he relied to establish a genuine issue of material fact. Upon review of the file, the Court discovered the deposition page was submitted separately as part of a corrected appendix to the suggestions in opposition.[1] As is evident from the Court's order, the assumption that page 35 of the deposition testimony was not supplied is not central to the Court's decision on the relevancy of the allegation made by Rinehart. Rather, the content and context of the statement did not make the necessary showing of intent to discriminate by Kaufman, especially when viewed in conjunction with

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[1] The Court also notes that page 35 of Rinehart's deposition was submitted as part of defendant's exhibit. While the Court reviewed all exhibits carefully and fully, including all proffered deposition testimony, the Court did not realize that plaintiff's "missing" page had been reviewed as part of defendant's submission. Perhaps this is indicative of the non-relevatory nature of Rinehart's statement.

Rinehart's admission elsewhere in the deposition that Kaufman had never evidenced an intent to discriminate other than by asking when Rinehart would retire. Based on the failure of plaintiff to present any evidence of discrimination, the Court entered summary judgment. The one page of deposition testimony does nothing to change the Court's mind that this case is ripe for summary judgment.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
APR 10 1995
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No. 94-1483

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

City of Independence, Missouri;
Larry Kaufman, Acting City Manager,
City of Independence, Missouri;
William Carpenter, Mayor,
City of Independence, Missouri,

Petitioners,

v.

Robert E. Rinehart,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there an absence of "special and important reasons" for granting certiorari in this garden-variety, fact-intensive ADEA case that has not even been to trial, but merely involves necessary reversal of summary judgment based on universal law from this Court, and all circuits, that the *McDonnell Douglas* prima facie case framework is flexible and cannot be mechanically, rigidly applied to justify summary judgment at the "prima facie case" stage, because the district court erroneously believed a well-performing, 67-year-old replaced by someone 20 years younger (but also over 40) could not make the fourth element of a prima facie case?

2. Is there any "conflict" whatsoever posed by the Eighth Circuit's simple reversal of summary judgment – "given the facts of this case"; or is the Eighth Circuit decision in line with every circuit that has squarely addressed the issue and followed this Court's pronouncements that "prima facie" elements vary, are flexible, were never intended to be rigid, mechanized and ritualistic, so it should not be dispositive or fatal at the prima facie case stage if plaintiff's replacement also was in the protected group?

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No. 94-1483

In The
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City of Independence, Missouri;
Larry Kaufman, Acting City Manager,
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v.

Robert E. Rinehart,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Eighth Circuit
Western District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert E. Rinehart respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's judgment which simply reversed and remanded the district court's grant of summary judgment on Rinehart's age discrimination claims.

STATUTES, AND RULES INVOLVED

In addition to 29 U.S.C. Section 623 (the "ADEA") set forth in petitioners' brief, the following rule is pertinent.

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part as follows:

* * *

> **(c) Motions and Proceedings Thereon.** [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Petitioners omit nearly all of the relevant evidentiary record before the Eighth Circuit and district court. The following non-exhaustive recitation provides additional material facts bearing on the Eighth Circuit's holding that the district court erred in entering summary judgment at the "prima facie case" stage.

Petitioner Robert Rinehart, born April 7, 1925, was fired from his job as Independence Police Chief on his 67th birthday, after twelve years as chief, and "36 years of a perfect record with no reprimands, no bad evaluations," and

without ever having been "informed by Mr. Kaufman [then City Manager] or anybody that I was not doing the job that was expected of me." (Rinehart Depo., 35; AI-3). During open city council meeting, the very night before the Chief's unexpected termination, the Independence mayor (petitioner Carpenter) had told the public assemblage, "[T]he chief is getting old . . . ." (Kaufman, Ex. 4). Petitioner Kaufman gave *no reason or explanation whatsoever* at the time of termination, but kept repeating to the Chief: "It was his decision [the city manager's] and his decision alone." (Rinehart Depo., 83-84; AI-37-38).

Before plaintiff's sudden termination, however, Kaufman repeatedly had asked plaintiff when he "was going to retire, and he [Kaufman] indicated *he was going to replace me with a younger person.*" (Rinehart, 35; AI-3).[1] Kaufman attested by affidavit that he "immediately" followed through on his stated intentions to replace the Chief with a younger person:

> Immediately following my termination of Mr. Rinehart, I appointed Major Shannon Craven as the Acting Chief of Police, who continues to serve in that capacity to the present time . . . . Shannon Craven was born on October 2, 1944 and thus was 48 years old at the time of his appointment . . . .

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[1] Pages 34-35 of Rinehart's deposition are included as Respondent's Appendix.

(Kaufman Affidavit, AIV-657).[2]

Evidence before the district court established that respondent Rinehart progressed through the ranks and was named Chief of Police in October, 1980. (AIV-786). He served under a succession of city managers, and received nothing but positive praise for his performance. (Rinehart, 124-127; AI-61-64). According to the Chief, "During my tenure as a police officer for the City of Independence, including Chief of Police, I was evaluated annually, and my evaluation reflected what I was doing, always . . . . my evaluations reflected I was doing a good job." (Rinehart, 124; AI-61). Over the years, respondent Rinehart received continuous feedback from the city managers under whom he served as to the operations of the police department, any changes they felt might be beneficial to the department, etc., and he always was told he was doing a good job. (*Id.*, AI-62-63). In fact, just weeks before scheduled trial of this case, the city produced for the first time a written "Employee Rating" which Mr. Kaufman apparently gave Rinehart on September 2, 1991 – a mere six months before termination – in which plaintiff's overall rating was "**GOOD.**" (A III-494-496).

Record evidence established that petitioner William Carpenter was elected mayor in April, 1990 (AIV-786), Kaufman was named "Acting City Manager" in August, 1990

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[2] As noted by the Eighth Circuit, Shannon Craven was more than 19 years younger than respondent Rinehart.

(AIV-655), and, thereafter, Mayor Carpenter, newly elected councilman Ruhlman, City Manager Kaufman, and Assistant Manager Jim Harlow, all began hounding plaintiff as to "when I was going to retire, or how much longer I was going to work, or both." (Rinehart, 41-42, 70-71; AI-5-6, 28-29). Repeated inquiries occurred approximately "during 1991, and I may be off a little bit, but it's in that year before I was terminated." The Chief responded to "everybody that asked" that he "had no intention of retiring, that he liked his job, was in perfect health, and would work as long as he was able." (*Id.*, 131, AI-68).

After Kaufman became Acting City Manager, it was generally known around the city that five "older" department heads – all in their 60s, and including Rinehart – were going to be removed. (Rinehart Depo., 52-58; AI-11-16). At one city council session involving department heads and council discussing budget, Kaufman announced that "we" might have to fire some city employees, and "I'll guarantee you one thing, I'll start at the top." (Rinehart Depo., AI-12-14).

The five targeted department heads were Fire Chief Norman Birch; Police Chief Rinehart; Power & Light Director Parley Banks; Superintendent of Streets Bill Gore; and Parks and Recreation Director Bill Brewster. (Rinehart Depo., 57-60; AI-15-18). After Chief Rinehart's discharge, three of the five heads were gone: Kaufman fired Banks February 6, 1991, at which time Banks was "oldest of all the city . . . departmental directors." (Banks Affidavit, AII-440-443); in 1991, Kaufman told Rinehart he wanted to terminate

Fire Chief Birch, and asked Rinehart to take over voluntarily both the police and fire departments under a new title, which plaintiff declined. (Rinehart, 50-51; AI-10A-10B). Chief Birch wrote a letter to defendant Kaufman, dated August 30, 1991, that refers to his being "forceably [sic] removed from my position," and objects to the city "Forcing me out of my position at my age . . . ." (A II-444). The district court also had before it testimony by Assistant Chief Gary George that Captain J. E. Barnett also believed the city was forcing him to retire: "He [Barnett] felt he was being forced to retire and he was going to fight it." (George, 161; AII-324). A memo written by Captain Barnett stated in pertinent part: "[T]he city is taking a position that when a police employee reaches age 55 and becomes eligible for retirement, they are no longer considered under the merit system . . . . Since I will be eligible for retirement in January, 1992, the city made the decision to eliminate my position." (AII-445).

Evidence also included respondent Rinehart's testimony that on April 6, 1992, the day before his discharge, the mayor said "in open council to the public that I was too old for the job." (Rinehart Depo. 71; AI-29). A partial transcript of the Council meeting confirms the Mayor's comment regarding the crowd getting a little bit out of hand: "Besides that, *the Chief is getting old* and I don't think he could control all of them tonight." When asked whether Mayor Carpenter was "joking," Chief Rinehart testified: "I didn't take it as a joke, and I don't take it as a joke today. It is my livelihood he is talking about . . . . because he is talking about my being able to do my job . . . . and I was

terminated the next day." (Rinehart Depo., 75; AI-33).

On April 7, 1992, petitioner Kaufman called plaintiff Rinehart away from his monthly staff meeting at 3:00 p.m., and told him, "I'm going to terminate you." Plaintiff asked, "For what reason?" Mr. Kaufman said only, "It's my decision and my decision alone." Rinehart testified, "There was no issue made on which Mr. Kaufman said, 'This is the reason I had to terminate you, or anything like that.'" (Rinehart, 87-88; AI-41-42). Only *after* plaintiff filed his charge of age discrimination did the City first mention that performance supposedly played a role in plaintiff's termination. The "City's Position Statement," filed May 22, 1992 with the EEOC, for the first time alleges Rinehart "was dismissed by the City for failure to carry out his duties as police chief in a competent manner," setting forth four specific areas.

In summary judgment proceedings, neither defendant nor the district court addressed, relied on, *or even reached* the legally crucial "reasons" for discharge. Contrary to law of this Court, and all of the circuits addressing the subject, the district court expressly refused to reach or consider plaintiff's evidence that the reasons for discharge were false and pretextual, and, instead, rendered summary judgment a mere four (4) days before trial, on the solitary, erroneous ground that plaintiff's case could be stopped at the "prima facie case" stage, which the court held required a showing on the "fourth element" that he was replaced by someone under 40. The Eighth Circuit reversed "given the facts of this case."

The Eighth Circuit's unanimous decision properly reversed summary judgment, on the unremarkable but correct bases that: "the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers age 40 or above (App. A-6); and "because there is agreement that this is not a reduction-in-force case, we can conclude that the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case" (A-8). Because the district court entered summary judgment on an erroneous legal premise that the *McDonnell Douglas* prima facie case framework could be rigidly applied so as to become case dispositive, the Eighth Circuit simply and properly held that a legal error had occurred and the case was remanded for further proceedings.

REASONS FOR DENYING THE WRIT

I. THIS SIMPLE, FACT-BASED REVERSAL OF SUMMARY JUDGMENT PRESENTS ABSOLUTELY NO "SPECIAL AND IMPORTANT REASONS" FOR REVIEW BY THIS COURT. INSTEAD THE EIGHTH CIRCUIT WAS COMPELLED BY THIS COURT'S, AND ITS OWN, PRECEDENTS, TO REVERSE SUMMARY JUDGMENT, BECAUSE THE DISTRICT COURT ERRONEOUSLY RENDERED SUMMARY JUDGMENT ON THE

SOLITARY, ERRONEOUS PREMISE THAT A 67-YEAR-OLD PLAINTIFF REPLACED BY A 48-YEAR-OLD COULD BE BARRED FROM PROCEEDING FURTHER BECAUSE THE FOURTH ELEMENT OF THE PRIMA FACIE SHOWING "REQUIRED" REPLACEMENT "OUTSIDE THE PROTECTED GROUP" OR "AN ADDITIONAL SHOWING" THAT AGE WAS A FACTOR.

1. The Eighth Circuit's holding in *Rinehart* is absolutely faithful to repeated, consistent pronouncements tracing back to *McDonnell Douglas*, that the "prima facie" framework "is not onerous," was "never intended to be rigid, mechanized, or ritualistic," but was meant "only to aid courts and litigants" to "evaluate evidence in light of common experience" so as to "sharpen the inquiry into the elusive factual question of intentional discrimination."

The Eighth Circuit announces no ground-breaking law; there is no constitutional issue; there is no conflict with other circuits. In short, there is no "special and important" reason for this Court to review the opinion, most particularly because the Eighth Circuit accurately applies law of this Court in existence since the "allocation" and "order of proof" paradigm first emerged 22 years ago.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), this Court set forth a simple framework for "the order and allocation of proof" in a Title VII case

alleging discriminatory treatment. Plaintiff's "initial burden" is accomplished merely "by showing":

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications he was rejected;
(iv) that, after his rejection, *the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.*

411 U.S. at 802, 93 S.Ct. at 1824. *Rinehart* fulfills the fourth element. Moreover, in *McDonnell Douglas*, this Court noted what has now been repeated in hundreds of appellate decisions: "The *facts necessarily will vary* in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* n. 13 (emphasis added).

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943 (1978), this Court again repeated that element 4 could be met if "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[3] In *Furnco*, this Court reemphasized the prima facie framework "was not intended to be an inflexible rule," clarifying as follows:

The method suggested in *McDonnell Douglas*

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[3] In Rinehart, that's precisely what happened.

> for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

438 U.S. at 577; 98 S.Ct. at 2949-50. This Court in *Furnco* emphasized what petitioners here ignore:

> *A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination, however.* Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations.

Id. at 579 (emphasis added).

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), this Court announced a rule ignored by petitioners and the district court which has

been repeated routinely, and most certainly supported reversing summary judgment here: "The burden of establishing a prima facie case of disparate treatment is not onerous." *Id.*, 101 S.Ct. at 1094.

In *Burdine*, the Court clarified that the simple function of the prima facie framework is not as a test for "submissibility" (as petitioners fundamentally misperceive), but merely to force the employer's explanation because "it eliminates the most common non-discriminatory reasons for the plaintiff's rejection," i.e. lack of qualifications, or lack of an available position.[4] *Burdine* clarified that the prima facie showing merely required the employer to "explain" the reason for discharge. Again, this Court emphasized that the prima facie standard was "not inflexible," that it "will vary" according to "differing factual situations," *Id.*, n. 6. But if the employer is silent in the face of the prima facie showing and the inference it creates, "the Court must enter judgment for plaintiff because no issue of fact remains in the case." *Burdine*, 101 S.Ct. at 1094.

In *U. S. Postal Service Board of Governors v. Aikens*, 360 U.S. 711, 103 S.Ct. 1478 (1983), this Court reviewed its previous decisions, and repeated the admonition that *McDonnell Douglas* "was never intended to be rigid, mechanized or ritualistic." 103 S.Ct. at 1482. This Court also gave this directive to district courts, in explaining the limited role of the prima facie framework:

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[4] *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977).

> Nor should they [district judges] make their inquiry even more difficult by applying legal rules which were *devised to govern 'the basic allocation of burdens and order of presentation of proof,' Burdine*, 450 U.S. at 252 . . . in deciding this ultimate question.

103 S.Ct. at 1482 (emphasis added). Ruling precisely as the Eighth Circuit was forced to do with respect to the district court's erroneous "focus" on the prima facie case below, this Court held the district court "erroneously focused on the question of prima facie case rather than directly on the question of discrimination." 103 S.Ct. at 1483.

In *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 108 S.Ct. 2777 (1988), Justice O'Connor reviewed prior law regarding the "prima facie case" and its purpose of "progressively sharpening the inquiry" into the "elusive factual question" of intentional discrimination. Significantly, this court again described prima facie principles one sees embodied and adhered to in the *Rinehart* decision:

> Under that scheme, *a prima facie case is ordinarily established* by proof that the employer, after having rejected the plaintiff's application for a job or promotion, *continued to seek applicants with qualifications similar to the plaintiff's* . . . the *burden of proving a prima facie case is not onerous* . . . and the employer in turn may rebut it simply by

> producing some evidence that it had legitimate, nondiscriminatory reasons for the decision.

108 S.Ct. at 2784 (emphasis added). Once again, this Court emphasized what petitioners should know but cannot acknowledge: "We have cautioned that the shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence," while the burden of persuasion remains with the plaintiff. *Id.*

St. Mary's Honor Center v. Hicks, ___U.S.___, 113 S.Ct. 2742 (1993) is this Court's most recent in-depth analysis of the *McDonnell Douglas* test. The Eighth Circuit holding and citations in *Rinehart* follow this Court's reiteration that the *McDonnell Douglas* formulation provides "minimal requirements" which create nothing more than "an initial rebuttable presumption," requiring the employer to give "reasons for its actions." *Id.* at 2747, 2751. Indeed, in contrasting how the factual inquiry "proceeds to a new level of specificity "after (1) a prima facie showing is made, (2) the employer articulates a legitimate explanation, and (3) plaintiff moves to proving the reasons are a pretext for discrimination, this Court characterizes the prima facie framework as mere "generalized factors":

> But the 'new level of specificity' may also (as we believe) refer to the fact that the inquiry now turns *from the few generalized factors that establish a prima facie case* to the

> specific proofs and rebuttals of discriminatory motivation the parties have introduced.

113 S.Ct. at 2752 (emphasis added). As recently as 1993, after 20 years with *McDonnell Douglas*, this Court again re-emphasized: "The *McDonnell Douglas* methodology was never intended to be rigid, mechanized or ritualistic." 113 S.Ct. at 2753. It is but "a *procedural* device, designed only to establish an order of proof and production." *Id.* at 2755 (italics in original).

In sum, against more than 20 years of established law from this Court, it defies credulity for Petitioners to assert that the Court of Appeals' ruling in this case somehow enables a terminated plaintiff to "get to the jury" without adducing any proof whatsoever of discriminatory animus. The "prima facie" case framework, properly applied, merely forces the defendant to explain itself – a stage the district court erroneously never reached. Thus the Eighth Circuit had no choice under this Court's precedents, as well as its own, but to reverse and remand for further proceedings.

2. There is no "conflict" among the Circuits that have squarely addressed the issue and uniformly held that the minimal requirements of a prima facie case do not require as a "bright-line" rule that the plaintiff must show he was replaced by someone outside the protected class or make "some additional showing" in a non-reduction-in-force termination.

Although *McDonnell Douglas* was a Title VII hiring case, its prima facie framework has been modified and adapted to other discrimination contexts. It will be apparent the Eighth Circuit's holding that the last element of a prima facie case is flexible, and may be met in a non-reduction-in-force context by showing plaintiff was replaced by someone sufficiently younger, is not only the "predominant" view, but nearly a unanimous view:

- **1st Cir.**: A Title VII plaintiff can "make out the fourth element of a prima facie case without proving that her job was filled by a person not possessing the protected attribute," but need only show the employer had "a continued need for someone to perform the same work after [the complainant] left." *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (5th Cir. 1990); *Sanchez v. Puerto Oil Company*, 37 F.3d 712, 719 (1st Cir. 1994) – ADEA plaintiff need only show that the employer sought a replacement with roughly equal qualifications: "The prima facie case requirement embodies a concept, not a mechanical exercise. Though its contours generally follow the *McDonnell Douglas* model, a prima facie case must be custom tailored to fit both the particular animus . . . and a particular type of employment decision involved . . . ." It is "not onerous."

- **2d Cir.**: *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir. 1985) *cert. denied*, 474 U.S. 829 (1985). Title VII case requiring plaintiff to show replacement was outside of the protected class "is inappropriate and at odds with the

policies underlying Title VII"; *Lowe v. Commack Union Free School District*, 886 F.2d 1364, 1372 (2d Cir. 1989) (ADEA plaintiff could not prevail on a *disparate impact* claim where employees who were treated more favorably were also in the protected age group, but the Court expressly stated that "there is nothing to prevent" plaintiff from prevailing on a *disparate treatment claim* on the same facts); *Benjamin v. United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 42 (2d Cir. 1989) (ADEA verdict affirmed for a 62-year-old plaintiff replaced by a 41-year-old); *Cronin v. Aetna Life Ins.*, 46 F.3d 196, 204-05 (2d Cir. 1995): The showing the plaintiff must make as to the elements of the prima facie case in order to defeat summary judgment is *'de minimis.'"*

- **3d Cir.**: ADEA case, *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986):

> Courts that have addressed this issue squarely have universally permitted a prima facie case to be shown through proof that the favored person was younger than plaintiff. All have held that the replacement need not be younger than 40, the age at which ADEA protection begins . . . . [citations from 5th, 6th, 11th, and DC omitted]
>
> Policy considerations support holding that a prima facie case may be established through proof of replacement by a younger person. *If*

> *no intra-group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience, since even an employer with clear anti-age animus would rarely replace them with someone under 40.*[5]

Armbruster v. Unisys Corporation, 32 F.3d 768, 777 (3d Cir. 1994) a RIF case in which the Third Circuit recognized that in a "typical ADEA pretext case," the fourth element is met if plaintiff is replaced "by a person sufficiently younger to permit an inference of age discrimination." Consistent with Eighth Circuit decisions, only reduction-in-force cases require modification of the "ordinary" prima facie framework, because plaintiff is not "replaced" but can show as the fourth element that he was laid off while other "unprotected workers were retained."

- **4th Cir.**: ADEA, *Lovelace v. Sherwin-Williams Company*, 681 F.2d 230, 237-38 n. 5 and 242 n. 13:

> As indicated, see note 5, an ADEA claim involving replacement by another *does not require as a matter of law proof that the other was outside the protected age group. But absolute and relative ages of the claimant and*

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[5] Id. at 792 (emphasis added). This statement of ADEA policy considerations accurately describes why "intra-group protection" is necessary for a 67-year-old Chief of Police.

> *his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible.* We agree with the First Circuit that replacement of a 60-year-old by a 35-year old, or even a 45-year-old within the protected class would be more suggestive of discrimination than replacement of a 45-year-old by a 42-year-old within the protected class, or a 39-year-old outside it.[6]

(emphasis added); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 992 (4th Cir. 1987), *cert. denied*, 44 U. S. 913 (1987) (citing fourth element in non-RIF ADEA discharge case as requiring that after plaintiff's rejection, "the position remained open and the defendant continued to seek or accept applications from persons of her qualifications.")

- **5th Cir.**: ADEA case, *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988):

> A prima facie case of age discrimination can be constructed where the plaintiff was replaced by a younger worker, even if the younger worker is himself within the protected class .... Such a showing is not, however, necessarily sufficient to prove a prima facie

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[6] Of course, the "bright-line" test petitioners advocate would allow the nonsensical result that a 41-year-old replaced by a 39-year-old would make the "fourth element," whereas a 70-year-old replaced by a 40-year-old could not.

> case. *The ADEA does not lend itself to a bright-line age rule* and in this respect differs from racial or sex discrimination cases, in which replacement by a worker outside the protected category is a convenient proof guideline. [emphasis added]

Fields v. J. C. Penney, Inc., 968 F.2d 533 (5th Cir. 1992) (the fourth element can be replacement by someone outside the protected class, or by someone younger, or other evidence of discharge because of age). In *Walther v. Lone Star Gas Company*, 952 F.2d 119 (5th Cir. 1992), the court held that plaintiff's replacement by an older worker during a RIF was not dispositive against plaintiff, but that plaintiff's "entirely circumstantial evidence" was "sufficient to support the jury's verdict." *Id.* at 123.

- **6th Cir.**: ADEA cases, *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990) held: "An employer violates ADEA when preference is given to a younger employee, *even if the younger employee is within the protected class of persons age 40 and over*"; *Manzer v. Diamond Shamrock Chemicals*, 29 F.3d 1078, 1081 (6th Cir. 1994): "a prima facie case has been shown where the plaintiff was replaced by someone younger, even though that person may still be within the protected class";

- **7th Cir.**: *Kralman v. Illinois Department of Veteran Affairs*, 23 F.3d 150, 155 holds:

> Indeed, it is considered hornbook law that the ADEA action can be based on discrimination between older and younger members of the protected class.

Reviewing all authorities that have squarely addressed the issue, the Seventh Circuit concluded:

> Based upon these authorities, we find that the district court erred in holding, as a bright-line test, that the plaintiff could not prove a *prima facie* case because the person who was ultimately hired for the job was 46 and, therefore, also a member of the protected class. We recognize there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination. However, in this case, the plaintiff, at age 71, was of an entirely different generation than the employee who was ultimately hired for the position. We, therefore, find that the plaintiff's evidence would satisfy the prima facie requirements under the ADEA.

23 F.2d at 155-156.

- **8th Cir.**: *Rinehart v. City of Independence*, 35 F.3d 1263 (8th Cir. 1994); *Hillebrand v. M-Tron Industries,*

Inc., 827 F.2d 363, 366, n. 6 (8th Cir. 1987), holding "A plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA"; *Davenport v. Riverview Garden School District*, 30 F.3d 940, 944-45 (8th Cir. 1994); *Williams v. Ford Motor Company*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 558 (8th Cir. 1989) – all holding under Title VII that district courts erroneously had required plaintiff to show replacement by someone outside the protected class in order to establish the fourth element of a prima facie case. In *Walker*, an ADEA and sex discrimination case, the Eighth Circuit found the trial court "placed inordinate reliance upon its finding that she [plaintiff] was replaced by a female." 881 F.2d at 558. The Court observed:

> Nevertheless, it is entirely conceivable that a woman discharged and eventually replaced by another woman may be able to establish that she was the object of impermissible discrimination related to her gender . . . . The ultimate inquiry in any Title VII suit is whether the plaintiff has established that a prohibitive factor played a determinative role in the employer's decision . . . and while we agree with the district court's ultimate conclusion that Walker failed to make such a showing, we also express some agreement with Walker's contention that *the sex of her replacement, although a relevant consideration, is not*

> *necessarily a determinative factor in answer to either the initial inquiry of whether she established a prima facie case, or the ultimate inquiry of whether she was the victim of discrimination.* [emphasis added]

Only in reduction-in-force cases has the Eighth Circuit modified the fourth element of the prima facie case to include replacement by someone outside the protected class, or "some additional showing" that age played a role in the discharge. *Kehoe v. Anheuser Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993); relying on *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985); *Banks v. City of Independence*, 21 F.3d 809 (8th Cir. 1994) (a RIF/consolidation case in which summary judgment was affirmed based on the totally distinguishable facts of *Banks*; the fact the district court in *Banks* properly reached and resolved the pretext issue and the ultimate question of discrimination; after which the Eighth Circuit "examined all of the exhibits submitted" and conducted "independent consideration of all the evidence" before concluding that *Banks* "failed to establish the existence of a genuine issue of material fact with respect to any discriminatory intent on the part of the city.")

- **9th Cir.**: *Douglas v. Anderson*, 656 F.2d 528, 532-33 (9th Cir. 1981) (in ADEA discharge case prima facie case normally met if replaced by "substantially younger employee," but replacement "by even an older employee" may suffice); *Breitman v. May Company-California*, 37 F.3d 562, 565 (9th Cir. 1994) (same).

- **10th Cir.**: *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (fourth element in non-RIF, ADEA discharge case met by showing replacement by "a younger person").

- **11th Cir.**: *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985) holding that a "mechanistic approach" for proving a prima facie case of age discrimination is "frequently inappropriate because it ignores the basic realities of this form of discrimination." The Court continues:

> Age discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discrete and immutable characteristic of an employee which separates the members of a protected group indelibly from persons outside the protected group. *Rather, age is a continuum, along which the distinctions between employees are often subtle and relative ones.* Nevertheless, age differences may be very real distinctions from the perspective of an employer, for whom an employee's age is a constantly shifting factor in the determination of his worth to the company.

758 F.2d at 1442 (emphasis added). The "realities of the work place" require intra-group protection, for reasons rooted

in unassailable logic, common sense, and long-established legal policy that applies precisely to the *Rinehart* decision:

> Seldom will a 60-year-old be replaced by a person in their 20s. Rather, the 60-year-old will be replaced by a 50-year-old, who, in turn, is succeeded by a person in their 40s, who also will be replaced by a younger person. Eventually, a person outside the protected class will be elevated, but rarely to the position of the one fired . . . . Because the discrimination involves age, rather than sex or race, a requirement that the replacement be from a non-protected group fails to take the reality of the work place into account. *Because of the value of experience, rarely are 60-year-olds replaced by those under 40.* The replacement process is more subtle, but just as injurious to the worker who has been discharged. That the person is replaced by a person 10 years younger, rather than 20 years, does not diminish the discrimination; the subtlety only tends to disguise it.

Goldstein at 1442-43 (quoting *McCorstin v. United States Steel Corporation*, 621 F.2d 749, 754 (5th Cir. 1980)). Goldstein was 60 years old, replaced by a 46-year-old, and the Court concluded that "Goldstein presented sufficient evidence to satisfy the discrimination prong of his prima facie case of age discrimination, even though the employee who

replaced him was himself within the protected age group." Id. at 1444. *Carter v. City of Miami*, 870 F.2d 578, 583 (11th Cir. 1989) (a 49-year-old plaintiff whose replacement was 46 years old established "fourth prong" of prima facie case of age discrimination); *Corbin v. Southland International Trucks*, 25 F.3d 1545 (11th Cir. 1994), in which the court reversed summary judgment in an ADEA case, expressly cited *Carter* and *Goldstein* with approval, holding as follows:

> Plaintiffs commonly seek to satisfy this third prong [of the prima facie case] by proving that the employer replaced them with a younger employee. Unlike race and sex discrimination cases, the plaintiff in an age discrimination [case] need not necessarily prove that his replacement was outside the protected class, that is, under 40 years of age. The plaintiff in an age discrimination case may establish a prima facie case merely by establishing that his replacement was younger than he, provided that the discrepancy between the ages, along with any other relevant evidence, is sufficient that a factfinder could reasonably infer age discrimination.

Id. at 1549 (emphasis added).

- **D.C. Cir.**: *Hamen v. National Academy of Sciences*, 23 F.3d 535 (D.C. Cir. 1994) (although the court states without analysis that the fourth element of the prima

facie case involves replacement from outside the protected class, the case cited in support is *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982), a decision by Judge Skelly Wright, who describes the fourth element as "(4) was disadvantaged in favor of a younger person." *Id.* at 857.

As the foregoing analysis of Circuit decisions clearly shows, there is uniformity (and near unanimity), rather than "disarray" or "divergence" among circuits. And where petitioners refer to "intra-circuit conflict," in reality any such "differences" are explained by (1) each Court's proper modifications for different cases (such as reductions) and (2) appropriate adherence to this Court's admonitions that the prima facie test is meant to be "flexible" and to "vary" according to the facts of a particular case.

Nothing more than a passing comment is needed to shoot down petitioners' unique suggestion that it is somehow aberrant that different cases, decided on two different sets of facts, based on two different sets of evidentiary submissions, submitted to two different judges, could cause different results – affirmance of summary judgment (*Banks v. City of Independence*); and reversal (*Rinehart*). Petitioners' suggestion that separate ADEA claims made by two individuals must, ipso facto, reach the same result has no support in fact or law. Likewise fanciful is Petitioners' unsupported assertion that the "panel in Rinehart viewed almost identical facts" as *Banks*, but reached a different conclusion only because it applied a different test. Nonsense. Just to illustrate factual differences, Chief Rinehart testified to direct

evidence of age discrimination – i.e. Kaufman repeatedly asked plaintiff when he "was going to retire and . . . indicated he was going to replace me with a younger person" – a material fact unique to Rinehart.

CONCLUSION

This case deserves and requires a trial, as the Eighth Circuit has mandated. The Eighth Circuit's decision that the district court erred by requiring plaintiff as a matter of law to show replacement outside the protected age group or make some additional showing of age discrimination as part of his prima facie showing is absolutely consistent with law of this Court and other circuits. The Eighth Circuit opinion engages in careful, scholarly analysis, firmly supported by its own precedents and this Court's commands. Respondent Robert Rinehart respectfully requests that this Court deny the Petition for Writ of Certiorari, because this case presents no issue appropriate for this Court's review.

Respectfully submitted,

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PAGES 34-35 OF DEPOSITION
OF ROBERT E. RINEHART
Taken April 27, 1993

* * *

Q. Before we talk about your meeting with Mr. Kaufman on the 7th of April, let me ask you this: Why do you believe you were fired?

A. Because I was too old. I had been there too long and I was too old and other circumstances involving that led me to believe that I was fired because of my age, because I was in perfect health, and I had passed the firearms testing, and I had qualified for firearms, and there no apparent reason for my dismissal.

Q. We'll come back to that part in a minute. When you say that you believe you were fired because you had been there too long, what do you mean by that?

A. I was an older employee, and it was my belief that I was removed because of my age. And, of course, my age reflected my tenure of service also, but there was movement in the City to move the older department heads out of the City and replace them with younger department heads. And there was a lot of talk about it being done [Pg. 35] while I was there. And the conversation that I was asked by Mr. Kaufman, the time when I was going to retire, and he indicated he

was going to replace me with a younger person. I asked him for a reason for my termination and he wouldn't give me a reason for it, he said it's his decision and his decision alone. (emphasis added).

Q. We'll come back to those in a minute. Other than your age, do you think there was any other reason related to your termination?

A. No, I had 36 years of a perfect record with no reprimands, no bad evaluations. I had not been informed by Mr. Kaufman or anybody that I was not doing the job that was expected of me, and I felt I was very competent in my job.

Q. So, as you sit here today, you believe that the only reason for your termination was your age?

A. Yes, I know that for a fact in my own mind.

Q. Do you believe that politics had anything to do with your termination?

A. I don't believe that politics would cause my termination.

* * *